

Congress of the United States
House of Representatives
Washington, DC 20515-1501

June 8, 2023

The Honorable Janet L. Yellen
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Yellen:

We are writing to express our concerns with an extraterritorial tax imposed on American companies under Section 49 of the German Tax Code. This is a clear example of a unilateral tax policy that burdens U.S. companies and hampers their ability to compete in the global marketplace.

Section 49 imposes a withholding tax on royalty payments for patent and trademarks registered in Germany. Mere registration of IP is deemed German-source income without any permanent establishment or other traditional taxable nexus. This law was largely dormant until 2020, as it was historically an exit tax for German multinationals, like the U.S. rules for out-bounding U.S. IP.

As a result of the OECD's Base Erosion and Profit Shifting (BEPS) initiative and the 2017 tax reforms, many U.S. companies brought their intellectual property back to the U.S. During these transactions, German advisors informed U.S. companies that Section 49 may apply and instructed them to submit a voluntary disclosure. These disclosures applied to prior year transactions involving royalty payments between non-German affiliates who had portions of their IP registered in Germany. The German government began assessing tax on U.S. companies based on these disclosures, and the German Finance Ministry issued guidance and extended deadlines to review these claims.

At the end of 2022, based on recommendations from the Finance Ministry, the German government repealed the provision going forward except as it relates to transactions with certain tax-havens. However, the German government maintained the retroactive application of the provision for related party transactions while repealing it for third party transactions. This approach effectively continues to subject U.S. multinationals to the withholding tax while excluding German multinationals, raising concerns about the disparate tax treatment – and subsequently the effect on competitiveness and relative administrative burden – for U.S. companies through companies headquartered in Germany.

Generally, tax jurisdiction over intangible returns should be allocated according to the location of certain functions and economic risks, both of which are absent in the case of simple IP registration. Putting aside the primary concern about taxation without nexus, the German government is failing to value the transactions using generally accepted transfer pricing guidelines and IP valuation principles. Despite multiple attempts by the companies, trade associations and legal advisors to demonstrate the divergences from long-standing guidelines and principles, the German government is unwilling to relent on its incorrect methodology, resulting in inflated assessments directed principally at U.S. multinationals.

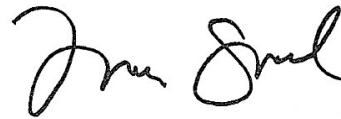
The financial and administrative impacts of enforcing this provision cannot be understated. The German government has tacitly acknowledged the imposition of Section 49 is merely a revenue grab and has publicly reported over \$1 billion in assessments. Some U.S. taxpayers have placed the aggregated estimate much higher – in the range of \$6-10 billion. It is important to note that the U.S. has the primary right of taxation on these earnings through the U.S. transition tax and GILTI tax provisions. At the end of the day, these funds come from the U.S. fisc at the expense of U.S. taxpayers.

We request a briefing on the engagement you have had on this issue to date, and how you plan to protect U.S. taxpayers moving forward.

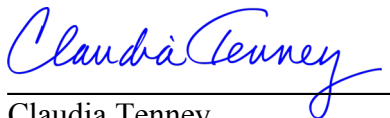
Sincerely,



Randy Feenstra
Member of Congress



Michelle Steel
Member of Congress



Claudia Tenney
Member of Congress



Ron Estes
Member of Congress



David Schweikert
Member of Congress



Carol D. Miller
Member of Congress



A. Drew Ferguson IV
Member of Congress



Kevin Hern
Member of Congress

cc:

The Honorable Anthony J. Blinken, Secretary of State
The Honorable Amy Gutmann, U.S. Ambassador to Germany
The Honorable Katherine Tai, U.S. Trade Representative